CANADA

Canada. Statutes. Fisheries Act
In the matter of a reference as to the Constitutional validity or interpretation of certain Sections of, or Regulations under The Fisheries Act, 1914.

DECISION OF
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MAY 28th, 1928

OTTAWA
F. A. ACLAND
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IN THE MATTER OF A REFERENCE AS TO THE CONSTITUTIONAL VALIDITY OR INTERPRETATION OF CERTAIN SECTIONS OF, OR REGULATIONS UNDER, THE FISHERIES ACT, 1914.

NEWCOMBE J.—

(*Concurred in by the* CHIEF JUSTICE *and* RINFRET *and* LAMONT JJ.)

The questions referred for the hearing and consideration of the Court, with the enactments or regulations to which they relate, are the following:—

"1. Are sections 7A and 18 of the Fisheries Act, 1914, or either of them, and in what particular or particulars, or to what extent, ultra vires of the Parliament of Canada?

Section 7A of the Fisheries Act, 1914 of the Dominion, was enacted as an addition to the Act of 1914. It is to be found in c. 16 of 1917, and reads as follows:—

"7A. No one shall operate a fish cannery for commercial purposes without first obtaining an annual licence therefor from the Minister. Where no other fee is in this Act prescribed for a cannery licence, the annual fee for each such licence shall be one dollar."

Section 18 appeared in the Consolidated Fisheries Act, c. 8 of 1914, as a section of four lines, but it was amended in 1919 by c. 52; in 1922 by c. 24, and again in 1924 by c. 24. These amendments have made important additions, and the section, as it stands within the purview of the question, as I interpret it, and as submitted at the hearing, reads as follows:—

18. No one shall operate a salmon cannery or salmon curing establishment in British Columbia for commercial purposes except under a licence from the Minister (1914, c. 8, s. 18).

(2) (*a*) The annual fee for a salmon cannery licence shall be twenty dollars, and in addition, four cents for each case of forty-eight one-pound cans, or the equivalent thereto, of sockeye salmon, and three cents for each case of forty-eight one-pound cans, or the equivalent thereto, of any other species of salmon, including steelhead (salmo rivularis), packed in such cannery during

the continuance in force of the licence. The said twenty dollars shall be paid before the licence is issued, and the remainder of the licence fee shall be paid as the Minister may from time to time by regulation prescribe. (1924, c. 43).

(*b*) The annual licence fee for a salmon curing establishment shall be:—

Fifty cents on each ton or fraction thereof of dry-salted salmon put up in the establishment during the season, when the total quantity of dry-salted salmon put up in one season does not exceed ten tons. Seventy-five cents on each ton or fraction thereof of dry-salted salmon put up in the establishment during the season, when the total quantity of dry-salted salmon put up in one season exceeds ten tons, but is not more than twenty tons.

One dollar on each ton or fraction thereof of dry-salted salmon put up in the establishment during the season, when the total quantity of dry-salted salmon put up in one season exceeds twenty tons, but is not more than fifty tons;

One dollar and twenty-five cents on each ton or fraction thereof of dry-salted salmon put up in the establishment during the season, when the total quantity of dry-salted salmon put up in one season exceeds fifty tons. (1922, c. 24, s. 1).

Question 2 is in these words:—

2. If the said provisions of the Fisheries Act, 1914, or either of them be intra vires of the Parliament of Canada, has the Minister authority to issue a licence for the operation of a floating cannery constructed on a float or ship, as contradistinguished from a stationary cannery constructed on land, and, if so, is he entitled to make the licence subject to any restrictions, particularly as to the place of operation of any such cannery in British Columbia?

Question 3 reads as follows:—

3. Under the provisions of the Special Fishery Regulations for the Province of British Columbia (made by the Governor in Council under the authority of sec. 45 of the Fisheries Act, 1914), respecting licences to fish, viz., subs. 3 of sec. 14; par. (*a*) or (*b*) of subs. 1 of sec. 15, or par. (*a*) of subs. 7 of sec. 24 of the said regulations, or under said sec. 7A or 18 of the said Act (if these sections or either of them be intra vires of the Parliament of Canada), has

(*a*) any British subject resident in the Province of British Columbia, or

(*b*) any person so resident who is not a British subject, upon application and tender of the prescribed fee, the right to receive a licence to fish or to operate a fish or salmon cannery in that Province, or has the Minister a discretionary authority to grant or refuse such licence to any such person, whether a British subject or not?

The special fishery regulations for the Province of British Columbia to which this question refers are to be found in a pamphlet printed for the Department of Marine & Fisheries, which was introduced by Counsel for the Attorney-General at the hearing. They read as follows:—

Subs. 3 of sec. 14: If the captain of a herring or pilchard drag-seine or purse-seine boat that is being used in operating a herring or pilchard drag-seine or purse-seine is not himself the licensee of the said drag-seine or purse-seine, he shall require a licence from the Minister to authorize his operation of the said drag-seine or purse-seine; and no other than a British subject shall be eligible for such licence. The fee for such licence shall be one dollar.

Paragraphs (*a*) and (*b*) of subs. 1 of sec. 15:—

(*a*) Except as herein otherwise provided fishing with nets or other apparatus, and the taking of abalone or crabs, except under licence from the Minister is prohibited; and in salmon fishing no one shall act as a boat puller or be otherwise employed in a boat used in salmon drifting, or as a helper, or in any other capacity in operating a purse-seine or drag-seine that is being used in salmon fishing, except under licence from the Minister.

(*b*) No licence shall be granted to any person, company or firm, unless such person is a British subject resident in the province, or is a returned soldier, who has served in His Majesty's Canadian Navy or Army overseas, or to such company or firm, unless it is a Canadian company or firm or is authorized by the Provincial Government to do business in the province.

Paragraph (*a*) of subs. 7 of sec. 24:

7. (*a*) No one shall fish for salmon for commercial purposes by means of trolling, except under licence from the Minister. Each person in a boat that is

being used in trolling for salmon shall be required to have a licence.

Paragraph (*b*) of this section adds that "the fee for a salmon trolling licence shall be one dollar."

Section 45 of the Fisheries Act, 1914, under which these regulations were made, is in the following words:
45. The Governor in Council may make regulations:—

(*a*) for the better management and regulation of the sea-coast and inland fisheries;

(*b*) to prevent or remedy the obstruction and pollution of streams;

(*c*) to regulate and prevent fishing;

(*d*) to prohibit the destruction of fish;

(*e*) to forbid fishing except under authority of leases or licences; R.S., s. 54.

(*f*) prescribing the time and the manner in which fish may be fished for and caught;

(*g*) to prohibit the export or sale of any fish or any portion of any fish from Canada, or the taking or carrying of fish or any portion of any fish from any one province of Canada to any other province thereof.

2. Such regulations shall take effect from the date of the publication thereof in *The Canada Gazette* or from the date specified for such purpose in such regulations and such regulations shall have the same force and effect as if enacted herein, notwithstanding that such regulations extended (sic.) vary or alter any of the provisions of this Act respecting the places or modes of fishing and shall be printed in the prefix in the next succeeding issue of the Dominion Statutes: Provided that any regulation made under the provisions of paragraph (*g*) shall not take effect until after six months after the date of its publication in *The Canada Gazette.*

3. Every offence against any regulation made under this Act may be stated as in violation of this Act.

At the hearing the case was presented on behalf of the Attorney-General, and Counsel were also heard for the Provinces of Quebec and British Columbia, and on behalf of fishermen of Japanese origin in the latter province, as a class of persons interested, as provided by subs. 4 of sec. 60 of the Supreme Court Act, under which the questions were referred.

Turning now to the first question, it will be observed that sec. 7A is grouped by Parliament along with sec 7, under the subtitle " Fishery Leases and Licences." Sec-

tion 7 appeared, in identical terms, as sec. 4 of the Fisheries Act, c. 95 of the Revised Statutes of Canada 1886, and it was impeached by the provinces in the argument of the Fisheries Case of 1898 (1898 A.C., 700), but it withstood that attack, subject to one observation which I shall mention. Lord Herschell had pointed out that sec. 91 of the British North America Act, 1867, did not convey to the Dominion any proprietary rights in relation to fisheries; he had referred to the distinction which should be borne in mind between rights of property and legislative jurisdiction; it was only the latter, he said, which was conferred under the 12th enumeration, "Seacoast and Inland Fisheries"; he had held moreover that, in addition to the legislative power derived under the item "Seacoast and Fisheries," the third item of sec. 91, "the raising of money by any mode or system of taxation," conferred that power exclusively, and he said "their Lordships think it is impossible to exclude as not within this power the provision imposing a tax by way of licence as a condition of the right to fish. It is true that by virtue of sec. 92 the provincial legislature may impose the obligation to obtain a licence in order to raise a revenue for provincial purposes; but this cannot in their Lordships' opinion, derogate from the taxing power of the Dominion Parliament to which they have already called attention."

Then came the observation to which I have alluded. It followed, he said, that, in so far as sec. 4 of the Revised Statutes of Canada, 1886, c. 95, "empowers the grant of fishery leases" (with which in the text of the section is coupled "licences") "conferring an exclusive right to fish in property belonging not to the Dominion but to the province, it was not within the jurisdiction of the Dominion Parliament to pass it." The qualification expressed in the last sentence was subsequently introduced by Parliament, *ipsissima verba,* into the Fisheries Act, and appears in the Consolidated Act of 1914 as sec. 3, limiting the application of the whole Act. That limitation was legislatively declared so early as the Revised Statutes of 1906, the revision which followed the reference of 1898, and it seems therefore to be manifest that the licensing of fish canneries for which sec. 7A provides is not intended to affect rights in the soil. It is an annual licence for the operation of a fish cannery which the section requires, and it is inaptly grouped with the licences mentioned in the preceding section.

An annual fee of $1 is imposed, unless another fee be prescribed by the Act; I have not discovered any such other provision, and our attention was not directed to any. It appears difficult to realize that the purpose of this section could have been the raising of money by taxation; certainly that was not the only purpose. The tax viewed as such is merely nominal, and could not, I should think, have been expected to indemnify for the cost of raising it. I have no doubt that the section, if it can be sustained at all, must be referred to the power which Parliament exercises in the regulation of Seacoast and Inland Fisheries. Undoubtedly Parliament has the exclusive authority to regulate what falls within that description, and one sort of regulation might be a licensing requirement. But a fish cannery is not, according to any of the definitions, or in practice, embraced within a fishery, seacoast or inland. It is for the preservation and marketing of the fish when caught and landed that the cannery fulfils a commercial purpose.

It was argued on behalf of the Attorney-General that, although the canning of fish may not be a fishing operation, it is nevertheless ancillary to the exercise of the powers of regulation which the Dominion possesses under the British North America Act, and the obligation which it assumed under the terms of Union with British Columbia; much reliance was founded upon the powers which are described as ancillary. The word does not occur either in the Act or Terms of Union; but "it must be borne in mind in construing the two sections (91 and 92) that matters which in a special aspect and for a particular purpose may fall within one of them may in a different aspect and for a different purpose fall within the other," (John Deere Plow Co. vs. Wharton, 1915, App. Cas., 339) and "ancillary" has on occasions been used judicially as a convenient expression by which to characterize some Dominion powers which have a provincial aspect, in relation to which the provinces may legislate, in the absence of a conflicting Dominion provision. An instance of this is to be found in the Assignments & Preferences Case, 1894, App. Cas., 189; but the explanation is not that the Parliament, in the execution of an ancillary power, legislates upon a subject not strictly comprised in the enumerations of sec. 91, but that, when the Dominion power, in the particular in question, over-laps provincial powers, it suspends them only to the extent of its exercise.

"Sec. 91 expressly declares that 'notwithstanding anything in this Act' the exclusive legislative authority of the Parliament of Canada shall extend to all matters coming within the enumerated classes; which plainly indicates that the legislation of that Parliament so long as it strictly relates to these matters is to be of paramount authority."

Tennant vs. Union Bank of Canada, 1894, App. Cas., at 46.

The powers thus known as ancillary belong to the Dominion enumerated powers, while the subject, in another aspect and for another purpose, is embraced within the Provincial powers. Usually the competition has arisen as between a specified Dominion power..... .....and the very comprehensive provincial power of property and civil rights within the province. These enumerations, as has been said, do not embody exact logical disjunctions. Precise definition of the area broadly embraced under an enumerated power is possible only to a limited extent. There is, not unfrequently, as has been pointed out, a margin within which either legislation may operate, the one in the aspect of the enumerated Dominion power, the other under the broad Provincial powers, so long as the field be clear. But the Dominion authority when exercised is paramount.

Now applying these principles, I think it is undoubted that, in the absence of any restricting consideration, the right to operate a fish cannery for commercial purposes is a civil right in the province where the operation is carried on, like the right to operate a fruit cannery or a vegtable cannery; and the question, as I see it, is whether the exercise of this right may be restricted or regulated by force of any enumerated Dominion power to which sec. 7A may be justifiably attributed.

I have said that in my opinion the enactment is not upheld by virtue of the taxing power.

In Patterson on the Fishery Laws (1863) p. 1, the definition of a fishery is given as follows:—

"A fishery is properly defined as the right of catching fish in the sea, or in a particular stream or water; and it is also frequently used to denote the locality where such right is exercised."

In Dr. Murray's New English Dictionary, the leading definition is:

> "The business, occupation or industry of catching fish or of taking other products of the sea or rivers from the water."

Neither the business of canning fish, nor the operation of a fish canning factory, is, by either of these definitions, nor by any other which I have found, comprised in "fisheries," as that word is used in sec. 91, or the terms of Union with British Columbia. Section 7A has no limited or special application to British Columbia, nor to any one of the provinces as distinguished from another, and it should therefore receive a general and uniform interpretation. The colony was admitted into the Union on the terms and conditions expressed, subject to the provisions of the British North America Act, 1867, and the stipulation with regard to the fisheries which is embodied in the terms of Union consists merely in an undertaking on the part of the Dominion to "assume and defray the charges for the XXX protection and encouragement of fisheries," a provision which I am disposed to think does not extend the legislative powers of the Dominion to the licensing of fish canneries.

To prohibit, or to impose restrictive regulations upon, the sale or the storage of fish, or the manufacture and sale of fishing lines or nets, or of whalebone, etc., might operate to protect the fish and to reduce the catch. It might be a useful power to possess in connection with, or as auxiliary to, the regulation of the fisheries. Unlimited powers would be still more useful, but none of these powers can become effective in the hands of the Dominion unless, upon the true interpretation, included within the definition of sea-coast and inland fisheries, as used in sec. 91. While the catching of fish for canning may, I suggest, be prohibited or regulated, there is no grant to the Dominion of the powers, which s. 7A assumes, to control broadly the operation of the canneries.

It was urged by the factum of the Dominion, but not pressed at the argument, that sec. 7A might be sanctioned under the power to regulate trade and commerce, but that contention may I think be regarded as disposed of by the considerations which were discussed by their Lordships of the Judicial Committee in the Insurance Reference, Attorney-General of Canada vs. Attorney-General of Alberta et al., 1916, A.C., 588.

There is no other enumeration of s. 91 which covers the case, and therefore I come to the conclusion that the power to enact s. 7A is not to be found in any of the enumerations, and is not possessed by the Dominion, seeing that the subject belongs to one of the provincial enumerations.

Section 18 relates to salmon canneries and salmon curing establishments in British Columbia, and, viewed as a regulating provision, is governed by the considerations which determine the invalidity of sec. 7A. But there are, in the case of salmon canneries, a fixed annual licence fee of $20, and additional payments to be made which are regulated according to the annual pack; it it is moreover provided that, for a salmon curing establishment, the annual licence fee shall be from fifty cents per ton to $1.25 per ton for the number of tons put up in the establishment during the season. These exactions give the enactment the appearance of a taxing provision, and it might perhaps, in other company, pass for that; but the Fishery Act is throughout a regulating Act, and it was as such that its predecessor, R.S.C. 1886, c. 95, was upheld in the Fishery Case of 1898 (1898 A.C., 700). In like manner, in the present case, sections 7A and 18 were, on behalf of the Attorney-General, maintained as deriving their sanction through the Dominion power to regulate sea-coast and inland fisheries. In the Special Fishery Regulations of 27th May, 1927, which were introduced into the case for purposes of the third question, it will be seen, by reference to s. 16, that the power to license canneries is, in fact, administered with a purpose to regulate their erection and operation. It provides as follows:—

> Section 16: Before a cannery licence shall be granted the applicant therefor shall make a statutory declaration setting forth, in the case of an existing cannery, if it is owned by a company or firm, the name of such company or firm, whether it is a Canadian company or firm, licensed to do business in the province, or if not owned by a company or firm, the name or names and nationality or nationalities of the actual owner or owners of such cannery, and in the case of a new cannery if it will be owned by a company or firm, the name of such company or firm and whether it is a Canadian company or firm licensed to do business in the province, or if it will not be owned by a company or firm, the name or

> names and nationality or nationalities of the person or persons who will own such cannery, and that in either case the applicant or applicants have the necessary capital to erect and operate such cannery.

This regulation was passed under no other power than that which the Governor in Council has by sec. 45 of the Fisheries Act to regulate the sea-coast and inland fisheries. There is of course nothing conclusive about it, but it seems to put the governmental practice in accord with the contention which was advanced on behalf of the Attorney-General that sections 7A and 18 were enacted in execution of the regulating power. If, then, the regulation of the fisheries by means of the local establishments be a real purpose, as it is an avowed purpose, of requiring the licences in respect of which the fees are imposed, it must I think follow that if these two sections fail in that respect for lack of enacting authority, they cannot be saved by invoking the taxing power.

"Within the spheres allotted to them by the B.N.A. Act the Dominion and the Provinces are rendered on general principle co-ordinate governments. As a consequence where one has legislative power the other has not, speaking broadly the capacity to pass laws which will interfere with its exercise. What cannot be done directly cannot be done indirectly" per Lord Haldane in Great West Saddlery Co. vs. the King, 1921, 2 Ap. Cas., at 100. And in the same case, His Lordship, in approaching the consideration of the pertinent question, which had to do with the validity of provincial legislation affecting the powers of Dominion companies, put it this way at p. 114:—

> "Can the relevant provisions of all or any of the three sets of provincial statutes be justified as directed exclusively to the attainment of an object of legislation assigned by sec. 92 to the legislatures, such as is the collection of direct taxes for provincial purposes; or do these provisions interfere with such powers as are conferred on a Dominion company by the Parliament of Canada to carry on its business anywhere in the Dominion and so affect its status?"

I think a purpose of s. 18 was to authorize the Minister to regulate salmon canneries and salmon curing establishments by means of a system of licences, and I think, for reasons which I have indicated, that the Dominion

has no power to do this; and that, if so, the legislation is not exclusively attributable to the exercise of powers possessed by the Dominion, and cannot therefore be upheld as an exercise of the taxing power.

Question 2, in view of the foregoing, requires no answer.

As to Question 3, that part of it which relates to ss. 7A and 18, is disposed of by the answer to Question 1.

There remain subs. 3 of sec. 14; pars. (A) and (B) of subs. 1 of sec. 15, and par. (*a*) of subs. 7 of sec. 24 of the Special Fishery Regulations for British Columbia. These regulations are made by the Governor in Council under the authority of s. 45 of the Fisheries Act, 1914. It is not necessary to determine whether this section contains any delegation of authority to levy taxes. The regulations specified are put forward as Special Fishery Regulations for British Columbia, and the Question submitted appears to be intended to relate to only their interpretation.

These regulations are of the same character and subject to common considerations. They prohibit fishing of various kinds, except under licence from the Minister. They affect the public right of fishing, and, in some cases, may be found to extend to private rights, or several fisheries.

Subsection 3 of s. 14 is confined to fishing for herring or pilchard by drag-seine or purse-seine, and it is declared that no other than a British subject shall be eligible for the licence provided for.

Paragraphs (*a*) and (*b*) of subs. 1 of s. 15 are introduced under the general heading of "Leases or Licences"; paragraph (*a*) relates to the taking of abalone or crabs, and salmon fishing by means of drifting, or the operation of purse-seines or drag-seines; but paragraph (*b*) is of general application; it prescribes generally the conditions of disqualification for licence in these words:—

> "No licence shall be granted to any person, company or firm unless such person is a British subject resident in the province, or is a returned soldier, who has served in His Majesty's Canadian Navy or Army Overseas, or to such company or firm, unless it is a Canadian company or firm, or is authorized by the Provincial Government to do business in the province."

As to s. 24, subs. 7 (*a*), it applies only to the fishing for salmon for commercial purposes by means of trolling, and requires that every person in a boat that is being used in trolling for salmon shall have a licence.

The regulations in question thus affect both public and private rights of fishing, and they should not be interpreted to derogate from those rights further than may be requisite to give the regulations their necessary and due effect. Those who are, according to the regulating provisions, declared to be ineligible, may not of course receive licences; but where an applicant is eligible within the regulations, and not otherwise disqualified, there is no express provision for withholding a licence, if he submit a proper application, and pay the prescribed fee, which, in each of the cases specified, appears to be no more than the sum of $1.

It is true that the licensing power is committed to the head of the Department, and no doubt will be administered with due care, but, if it were intended that he should exercise a discretion to refuse a licence to a qualified applicant, there would, I should think, have been something expressive and definitive of that intention. The regulations which we are asked to construe derive their force not by direct legislative enactment, but through the exercise of powers delegated by the statute to the Governor in Council. The powers are very large, and the regulations to be made under them are declared to have the same force and effect as if enacted in the Fisheries Act. They are of the nature of statutory rules. Section 45 of the Fisheries Act, 1914, authorizing the regulations, is like the provision which was interpreted by the House of Lords in Institute of Patent Agents vs. Lockwood, 1894, A.C., 347, 359, 360, where the Lord Chancellor (Herschell) said in his speech:—

> "The effect of an enactment is that it binds all subjects who are affected by it. They are bound to conform themselves to the provisions of the law so made. The effect of a statutory rule if validly made is precisely the same that every person must conform himself to its provisions, and, if in each case a penalty be imposed, any person who does not comply with the provisions whether of the enactment or the rule becomes equally subject to the penalty. But there is this difference between a rule and an enactment, that whereas apart from some such provision

as we are considering, you may canvas a rule and determine whether or not it was within the power of those who made it, you cannot canvas in that way the provisions of an Act of Parliament. Therefore, there is that difference between the rule and the statute. There is no difference if the rule is one within the statutory authority, but that very substantial difference, if it is open to consideration whether it be so or not."

But no legislative power is delegated to the Minister, even if the Governor in Council could delegate any of his statutory powers. No express power is conferred upon the Minister, except to issue licences, and in my view, it is improbable that it was intended to confer a reviewable discretion, or that, unless by plain legislative direction, discretionary licensing authority would have been granted which could be exercised in a manner which might sanction discrimination. There is no provision, beyond those contained in subs. 3 of s. 14, and subs. 1, paras. (*a*) and (*b*) of s. 15, of the regulations submitted, which prescribes disqualifications or prohibited classes, and I am not satisfied that the statutory rules, which go no further than to impose a general requirement for licences, for which a fee is to be paid as a condition to the exercise of the right of fishing, should be interpreted by implication further to limit that right by making the issue of the licence discretionary in the judgment of the licensing authority.

The answers may therefore be stated as follows:—

Question 1: The answer, as to both sections 7A and 18, is entirely in the affirmative.

Question 2: In view of the preceding answer, this question requires no answer.

Question 3: As to each of the specified regulations, viz., subs. 3 of sec. 14; paras. (*a*) and (*b*) of subs. 1 of sec. 15, and par. (*a*) of subs. 7 of sec. 24, any British subject resident in the province of British Columbia, who is not otherwise legally disqualified, has, according to the true interpretation of these clauses, the right to receive a licence, if he submit a proper application and tender the prescribed fee. As to any person resident in the province of British Columbia, who is not a British subject, he is not eligible for a licence of the character described in subs. 3 of sec. 14, it being expressly declared by that subsection that " no other than a British

subject shall be eligible for such licence." And none of the other licences in question shall, as provided by par. (*b*) of subs. 1 of sec. 15, be granted to any person, unless he "is a British subject resident in the province, or is a returned soldier who has served in His Majesty's Canadian Navy or Army Overseas." It is unnecessary to interpret the regulations with respect to the operation of fish or salmon canneries, inasmuch as sections 7A and 18 are held to be *ultra vires*.

MINORITY REPORT

Delivered by DUFF, J. *and Concurred in by* MIGNAULT *and* SMITH JJ.

DUFF J. (Concurred in by Mignault & Smith, JJ.)

As to Questions 1 and 2, I concur entirely with the view of my brother Newcombe.

As to Question 3, The only express authority for the grant of licences by the Minister of Marine and Fisheries is that given by section 7 of the Act, which is in these words, "The Minister may wherever the exclusive right of fishing does not already exist by law issue, or authorize to be issued, fishery leases and licences for fisheries and fishing wheresoever situate or carried on; but leases or licences for any term exceeding nine years shall be issued only under authority of the Governor in Council." This section was considered by the Judicial Committee of the Privy Council on the Fisheries Reference in 1898. And it was there held that in so far as it authorized the granting of the leases for fishing in places which were the property, not of the Dominion, but of a Province it was beyond the power of parliament to enact; and, by Section 3, the Act is to be read subject to this pronouncement. Section 3 leaves a considerable field for the operation of section 7 in relation to leases and exclusive licences, where that action was passed. The beds of the tidal waters within the British Columbia Rly. Belt and on the coast of James Bay and the Arctic were the property of the Crown in the right of the Dominion, and to these waters the provisions of the section would apply. It would also apply to fresh water lakes and rivers, the beds of which are in the Dominion. In British Columbia this would include the beds of such waters in the Railway belt and in the Peace River tract.

When the section was first enacted, it was no doubt assumed, according to the view then held by the advisers of the Dominion, that the property in the beds of tidal waters was in the Crown in the right of the Dominion, and probably the intention of the section was to vest in the Minister, authority to grant leases, and licences, exclusive as well as non-exclusive apparently, for fishing in such waters.

In view of the history of the section, there is much to be said for the view that the authority vested in the Minister under it, is a discretionary authority. That is to say, that in point of law, the Minister is under no legal duty to grant leases or licences, or to grant any particular lease or any particular licence. It is sometimes not easy in construing the provisions of a modern statute, by which powers are vested in a Minister of the Crown, to determine whether or not the Minister, as the depositary of such powers, is intended to be constituted an agent of the Legislature (See the argument of Sir George Jessel, L.R. 7 Q.D. at p. 389) to exercise those powers, an instance of that being the statute considered in *re* Massey 13 O.A.R., 446; or whether the Legislature has named him as the donee of the power in his capacity of servant of the Crown. As the Minister here is authorized to grant leases of Crown property, it seems probable that he is intended in executing his powers under the section, to act for, and in the name of the Crown. In this view of the Minister's functions, a subject would possess no right capable of specific enforcement in a court of law to demand a lease or licence. The Queen v. The Lords Commrs., L.R. 7 Q.D. 388; although it would not necessarily follow that the Minister is not under a duty, a legal duty owing to and enforceable by the Crown, to grant licences to applicants as they demand them.

In considering the question whether or not the section has the effect of constituting rights, that is to say legal rights, vested in His Majesty's subjects, or a legal duty binding the Minister, owing to the Crown, one must first notice that, in form, the clause is permissive only. There has been a good deal of discussion upon the subject of the indicia, to which one must give attention, in considering whether a grant of authority permissive in form is coupled with an obligation to exercise that authority. The word " may " and similar expressions are always, in themselves, permissive in effect as well as in form, and a grant of authority in the form of section 7, does not itself imply any direction requiring the donee to act under the power. The subject was very fully discussed in the well known case of Julius v. The Bishop of Oxford, 5 App. Cas. 514 at page 235, Lord Selborne observes upon the question whether an enforceable duty arose to exercise a power admittedly conferred by statute, that in general such a ques-

tion must be solved from the context of the particular provision and from the general scope and objects of the enactment conferring the power.

Looking first at the section itself, it is impossible to suppose that the authority vested in the Minister to grant leases was not a discretionary one, and prima facie at all events, the same must be said with regard to the authority to grant licences. Is there anything, then, in the context, that is to say in the parts of the act which are in pari materia, with section 7, or in the subject matter of the legislation, which requires us to imply the existence of a legal duty incident upon the Minister? Before turning to the particular regulations now before us, it should be noted that section 45, which empowers the Governor in Council to make regulations, expressly authorizes in subsection C, the prohibition of fishing except under the authority of leases or licences. This enactment, in so far as it relates to leases or licences by the Minister, seems to contemplate leases or licences under section 7, and the particular regulations now in question (subsection 3 of section 14, paragraphs A and B of subsection 1 of section 14 and subsection 7 of section 24) were probably passed in execution of this specific authority. At all events, there seems to be no reason to doubt that a licence under the authority of sec. 7 would constitute a sufficient warrant to exempt, the holder of it from the prohibitions enacted by the regulations in question.

There is nothing in the terms in which these provisions are expressed, nor, as far as I have been able to discover, in the terms of the regulations, pointing to a conclusion that the authority of the Minister is not a permissive one. Are there reasons, then, arising from the character of the subject matter, sufficiently potent to require us to hold that the Minister is under a duty to grant licences to those who apply for them?

Speaking broadly, every subject of His Majesty is entitled to exercise the right of fishing in tidal waters in B.C., and a statutory enactment which in a reasonable view of it might expose such rights to oppressive or arbitrary or capricious restrictions would receive a jealous scrutiny in any Court called upon to enforce it. But on the other hand, the authority to grant leases, given by section 7, necessarily involves some restriction of the public right, that is to say, the exclusion of the public as a whole, from the waters in which the exclusive right of

the lessee prevails, and in the case of leases for nine years and less, the discretion to grant them is vested in the Minister; and so with regard to exclusive licences. As to leases and exclusive licences, the Minister's power is of course necessarily discretionary. You cannot, self-evidently, have two leases or exclusive licences operating in the same locus at the same time and affecting the same kinds of fish, and as no two localities are exactly the same, there is necessarily, not only a limitation in respect of numbers, but discrimination as between parties to whom applications are granted. And of course, in cases where a competition occurs, one applicant is unavoidably favoured at the expense of all the rest. The natural inclination of Parliament against favoritism, to this extent at all events, yielded to considerations which must have appeared to be sufficient.

As to non-exclusive licences, I can discover nothing in the subject matter which dictates an inference, that, as regards these, the authority of the Minister is of a different order. There is a power of cancellation, given to the Minister in the case of licensees, who offend against the law. It seems difficult to suppose, if in point of law, a discretion was not vested in the Minister to refuse an application for a licence, that provision would not have been made empowering him to refuse, in cases in which he was satisfied, for any reason, that the applicant was not a fit person to receive a licence from the point of view of a government department concerned with the observance or enforcement of enactments or regulations governing fisheries.

The authority of the Minister to grant leases would appear to embrace the right to determine the stipulations of the lease, including the enaction and the terms, clauses of re-entry and forfeiture. I see no reason why it should be supposed that the Minister would not be entitled to insist upon special stipulations, as to the methods by which fish should be caught. The same with regard to exclusive licences. As to non-exclusive licences, I should suppose that the regulations contemplate at least the possibility of special provisions as to special areas, and as to the kinds of fishing permitted. Where a licence is granted for fishing with nets or other apparatus, I should suppose that the licence ought to define in some way, the instruments permitted and the manner and conditions in which such instruments are to be employed, and there would appear to be some

reason to think, although we have not been favoured with any explanations on the point, that, as regards such licences, some sort of discretionary authority would almost be necessary, in order to secure, with any degree of confidence, the purpose of the regulation.

I do not see any reason for holding that the Minister might not refuse all licences to fish for salmon, for example, with a particular kind of instrument, either generally or in a particular district. And it would, I think, be a singular thing if there were no discretion to refuse a licence to employ a particular kind of instrument to a person who was known to have systematically abused his privilege by violating the act or the regulations.

One consideration seems to be of importance. The donee of the power in this case is a Minister of the Crown, accountable first of all to the Crown, that is to say, to the Government as a whole, and then to Parliament, for the execution of his powers. The subject is not susceptible of extended discussion; but such examination as I have made of the statute and such attention as I have given to the subject matter have not disclosed good reasons why the political sanctions under which the Minister acts, should not in the view of the Legislature, have been regarded as quite adequate in themselves to insure an administration of the Act in good faith, with an eye to the public interest.